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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KOUROSH BANIASSAD,

Defendant and Appellant.

G055645

(Super. Ct. No. 01CF1721)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Jeannie M. Joseph, Judge. Affirmed.

C. Matthew Missakian, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige
B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

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Seeking to avoid the adverse immigration consequences of two 2002 insurance fraud convictions based on a guilty plea, appellant Kourosh Baniassad filed a motion under Penal Code section 1473.7 to vacate the convictions. (All further statutory references are to the Penal Code unless otherwise noted.) Baniassad contended his former attorney did not fully advise him of the immigration consequences of the guilty plea. The superior court denied the motion to vacate, concluding that the change of plea form, his attorney, and the court properly advised Baniassad about the immigration consequences of entering a guilty plea. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Baniassad immigrated from Iran in 1984 at the age of 13. He married his wife, a United States citizen, in 1993, and obtained his green card (indicating his lawful permanent resident status) the same year. On February 28, 2002, the Orange County District Attorney's Office charged Baniassad with two felony counts of presenting a fraudulent claim for loss (§ 550, subd. (a)(4)), one count of forgery (§ 470, subd. (a)), and one count of grand theft (§ 487, subd. (a)).

On June 7, 2002, Baniassad, represented by retained counsel, pleaded guilty to two counts of insurance fraud in violation of section 550, subdivision (b)(1). On the change of plea form, Baniassad initialed the box next to the statement "I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." He also initialed the box next to the statement "I declare under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney. . . ." Both Baniassad and his attorney Barnett signed the plea form. The deputy district attorney also signed the form. The minute order stated that Baniassad was advised of the "possible consequences of [the guilty] plea affecting deportation and citizenship."

The superior court suspended imposition of sentence and placed Baniassad on formal probation for three years, conditioned on serving 120 days in county jail. In February 2004, consistent with the plea agreement, the court granted Baniassad's motion to reduce the charges to misdemeanors. In December 2005, the court granted Baniassad's motion to set aside his guilty plea and dismiss the criminal complaint pursuant to section 1203.4. The dismissal apparently did not affect the immigration consequences of his insurance fraud convictions.

On August 28, 2014, Baniassad was returning to the United States from a family vacation in Costa Rica when immigration authorities detained him at the Miami airport. On November 13, 2014, the Department of Homeland Security (DHS) issued Baniassad a notice to appear, alleging he was "subject to removal from the United States" due to his insurance fraud convictions. The notice cited a provision of the Immigration and Nationality Act (INA) which provides an alien is removable if "convicted of . . . acts which constitute the essential elements of a crime involving moral turpitude." (8 U.S.C. 1182 (a)(2)(A)(i)(I); INA § 212, subd. (a)(2)(A)(i)(I).)

A. The Motion to Vacate the Conviction

In August 2017, Baniassad moved under section 1473.7 to vacate the 2002 insurance fraud convictions and withdraw his guilty plea. Effective January 1, 2017, section 1473.7 allows a person no longer in custody to ask the court to vacate a conviction which "is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).) The statute requires the court to grant the motion to vacate "if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." (§ 1473.7, subd. (e).)

Baniassad asked the superior court to vacate his convictions. He argued the convictions were legally invalid because his attorney provided constitutionally deficient

representation in recommending Baniassad plead guilty to the two insurance fraud charges without advising him that as a result of his guilty plea, “if he traveled outside the United States, even on a brief family vacation, he would not be allowed back in despite his lawful permanent resident status.”

In support, Baniassad submitted his own declaration, declarations from his current defense counsel and from his former attorney, the court docket, certain immigration orders, and the change of plea form.

In his declaration, Baniassad stated that at the time he “plead guilty [he] was assured by counsel that the plea agreement would not have any adverse effect on my status here in the US.” He admitted that “[s]ince the time of the plea I actually renewed my green card and traveled outside the country on several occasions.” Baniassad faulted his former attorney for failing to discuss “anything relating to inadmissibility and the risks I would be taking merely by taking my family on vacation outside the country.” Baniassad asserted he would never have pleaded guilty had he known “that by accepting the plea offer I would forever be barred from leaving the United States at the risk of being permanently barred from re-entering. Moreover, I would have not accepted the offer on the day in question but instead would have wanted to discuss that issue further with counsel and my family.”

The declaration from Baniassad’s former attorney stated that he could not “recall any specific detail regarding Mr. Baniassad from 2002.” Counsel also stated that he was contacted by Baniassad’s immigration attorney, Mr. Ardalan, who explained that “since the loss was over \$10,000 and the charges involved a crime of moral turpitude, Mr. Baniassad would be deported unless the District Attorney’s office agreed to stipulate that the loss was less than \$10,000 or alternatively, change the charges to offense not involving moral turpitude.” Counsel later contacted the district attorney, but was advised that “they could do nothing because this was an insurance fraud case.” The declaration

from Baniassad's current defense counsel stated that the court reporter present at the hearing on the plea had died, and the notes from that hearing had been destroyed.

At the hearing on the section 1473.7 motion, Baniassad testified that he repeatedly told his former attorney he did not "want to lose my green card. I don't want to be removed from the U.S." He further testified that the "only thing [we] were concerned about was saving the green card; that's what everybody was pushing for." He acknowledged that his green card was renewed, and that since the time of the plea, he traveled internationally more than 10 times. He further acknowledged he paid \$48,365.90 in restitution as part of the plea agreement.

The district attorney filed no written opposition to the motion, but at the hearing argued Baniassad failed to meet his burden of proving prejudicial error by a preponderance of the evidence.

B. Superior Court Order Denying the Motion to Vacate

After ruling that the motion to vacate was timely, the superior court denied the motion on the merits. It found Baniassad was "sophisticated enough to run a business, knows to hire professionals to do his taxes and immigration attorneys to do his paperwork to get his [legal permanent resident] status." It further found that Baniassad and his former attorney discussed immigration consequences. "[Y]ou can see from how the plea was negotiated that that was a primary concern, was his immigration status, and he got a very favorable plea as a result of . . . [his former attorney]." The court noted: "[H]e tried to avoid the obvious immigration consequences by making them misdemeanors, not crimes of moral turpitude, not listing the loss amount, which was over \$10,000, it was \$50,000. He had no jail time." It concluded that "[counsel] appropriately advised [Baniassad] of the potential consequences."

The superior court further noted Baniassad initialed the box on the change of plea form stating he understood, that "if I'm not a citizen of the United States the conviction for the offense charged *will* have the consequence of deportation, exclusion

from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (Italics added.) The court further noted the minutes reflected that the court had advised Baniassad of the immigration consequences.

Finally, the superior court stated: “I think what happens is there is an intervening event. He travels, nine years later. I don’t think it’s a prejudicial error . . . for [counsel] not to foresee all the potential ways [Baniassad] could jeopardize his lawful permanent status beyond the fact that he’s negotiated a plea that doesn’t immediately end up in deportation.” It concluded: “I don’t see a prejudicial error here in this case where the immigration consequences were the issue. He was advised of that and it was made clear that his [plea] absolutely would have immigration consequences.”

II

DISCUSSION

A. *Preliminary Matters*

The parties suggest that the standard of review is abuse of discretion. We agree that abuse of discretion is the appropriate standard where the section 1473.7 motion to vacate is made based on statutory error or a deprivation of statutory rights. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [decision to deny a motion to withdraw a guilty plea rests in the sound discretion of the court].) However, where the section 1473.7 motion is made based on a claim of ineffective assistance of counsel, our review of the superior court’s order denying the motion is de novo. (See *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76, 79 (*Ogunmowo*); accord, *People v. Tapia* (2018) 26 Cal.App.5th 942, 950 (*Tapia*); *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116-1117 (*Olvera*).) Under this standard, we “accord deference to the trial court’s factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel’s deficient performance and resulting prejudice to the defendant.” (*Ogunmowo, supra*, 23 Cal.App.5th at p. 76.)

Baniassad contends that he need not demonstrate his attorney was constitutionally ineffective under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) to receive the benefits of section 1473.7. We agree a petitioner may obtain relief under section 1473.7 without demonstrating his attorney was constitutionally ineffective. (See § 1473.7, subd. (a)(1) [“A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel”].) But where the motion to vacate is based on an attorney’s constitutionally deficient performance, section 1473.7 does not relieve defendant of his burden to show counsel was ineffective under the *Strickland* test. (See *Ogunwomo, supra*, 23 Cal.App.5th at p. 75 [to show entitlement to relief under section 1473.7 based on ineffective assistance of counsel, defendant must satisfy *Strickland* test]; accord, *Olvera, supra*, 24 Cal.App.5th at pp. 1116-1117; *Tapia, supra*, 26 Cal.App.5th at p. 951.) Thus, to obtain relief under section 1473.7 based on a claim of ineffective assistance, Baniassad had to prove “that (1) counsel’s representation fell below an objective standard of reasonableness, as judged by ‘prevailing professional norms’ [citation], and, (2) ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different’ [citations]; that is, ‘a reasonable probability exists that, but for counsel’s incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial’ [citations].” (*Olvera, supra*, 24 Cal.App.5th at pp. 1116-1117.)

Finally, before proceeding to the merits, we must address the Attorney General’s procedural challenge to Baniassad’s motion to vacate the conviction based on lack of “reasonable diligence” within the meaning of the statute. Section 1473.7, subdivision (b)(2), states a motion to vacate must be “filed with reasonable diligence after the *later* of the following: [¶] (A) The [date the] moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal. . . . [¶] (B) [The date] a final removal order has been issued against the moving party, based on the existence of the conviction

or sentence that the moving party seeks to vacate.” (*Ibid.*, italics added.) The Attorney General asserts we should dismiss the appeal because Baniassad did not act with the requisite “reasonable diligence” in moving to vacate the conviction, citing the eight-month gap between the effective date of the statute and Baniassad’s motion to vacate.

The Attorney General’s lack of diligence argument ignores the fact there is no final “removal order.” Because section 1473.7 permits Baniassad to file after the later of a notice to appear *or* a final removal order, Baniassad’s motion to vacate was filed with reasonable diligence. Accordingly, the superior court properly concluded that Baniassad’s motion was timely.

B. No Statutory “Prejudicial Error”

On appeal, Baniassad contends he proved by a preponderance of the evidence that he was entitled to have his convictions vacated and his guilty plea withdrawn because “he pled guilty under the mistaken belief that his conviction would have no immigration consequences.” Baniassad contends his mistaken belief constitutes “prejudicial error” under section 1473.7 because his “mistake damaged his ability to meaningfully understand, defend against, or knowingly accept the immigration consequences of his plea, and he was therefore entitled to withdraw his plea under section 1473.7.” The record does not support this contention. The superior court implicitly discredited Baniassad’s assertion that he mistakenly believed his plea would have no immigration consequences when it found that Baniassad was informed of the immigration consequences by the change of plea form, his attorney, and the trial court. The court’s credibility finding is substantiated by the change of plea form and the minute order reflecting that Baniassad was repeatedly informed that the guilty plea “will” result in immigration consequences, and repeatedly affirmed his understanding of those consequences. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 829-830 [per section 1473.7, defendant failed to show lack of “meaningful[] understand[ing]” of immigration

consequences because plea form, defense counsel, and trial court described those consequences and defendant stated that he understood them].)¹

Moreover, even had there been a mistake of law about the immigration consequences of the plea, Baniassad has not shown he suffered any prejudice. (Cal. Const., art. VI, § 13 [“No judgment shall be set aside, . . . in any cause, on the ground . . . of the improper admission or rejection of evidence, . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”]; see also *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 194-198 (*Zamudio*) [art. VI, § 13, applies to § 1016.5, subd. (b), which permits defendant to request a court to vacate judgment and withdraw guilty plea based on court’s failure to provide advisement about immigration consequences of plea].) To demonstrate prejudice, ““when the only error is a failure to advise of the consequences of the plea . . . the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is “reasonably probable” the defendant would not have pleaded guilty if properly advised.”” (*Zamudio, supra*, 23 Cal.4th at p. 210.) Here, the superior court concluded there was no prejudicial error because the plea agreement was “very favorable” and minimized the immigration consequences of the plea because it made the crimes misdemeanors, did not list the loss amount, and resulted in no prison sentence. Baniassad’s own declaration, filed years later, merely stated that had he known of the immigration consequences, “I would have not have accepted the offer on the day in

¹ Baniassad’s reliance on *People v. Patterson* (2017) 2 Cal.5th 885 (*Patterson*) is misplaced. Baniassad acknowledges that *Patterson* involved a different statute (§ 1018). More important, in *Patterson*, our high court reversed an order denying a motion to withdraw a guilty plea under section 1018 based solely on the trial court’s advisements that the defendant ““may”” suffer immigration consequences. (*Patterson, supra*, 2 Cal.5th at p. 889.) In contrast, here, the superior court denied the section 1473.7 motion on the grounds that (1) the change of plea form, (2) defense counsel, and (3) the trial court advised Baniassad that he “will” face immigration consequences.

question but instead would have wanted to discuss the issue further with counsel and my family.” This record is insufficient to show it was reasonably probable that Baniassad would not have pleaded guilty if properly advised. Accordingly, the superior court did not err in denying the section 1473.7 motion to vacate.

C. No Ineffective Assistance of Counsel

Baniassad argues in the alternative that he received constitutionally deficient representation because his former attorney misadvised him that he would suffer no immigration consequences as a result of his guilty plea. As an initial matter, this contention is arguably forfeited, as Baniassad’s written section 1473.7 motion was based on his lawyer’s failure to specifically advise that the guilty plea would result in Baniassad being barred from reentry if he left the United States, not on the ground that his attorney affirmatively misadvised Baniassad that he would suffer no immigration consequences.

In any event, the superior court discredited Baniassad’s claim that his former attorney misadvised him. It specifically found counsel appropriately advised Baniassad about the immigration consequences of entering a guilty plea. The court’s credibility determination is amply supported by the change of plea form. There, Baniassad declared under the penalty of perjury that he discussed with his attorney the following statement: “I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, *exclusion from admission to the United States*, or denial of naturalization pursuant to the laws of the United States.” (Italics added.)

Moreover, even if Baniassad had received constitutionally deficient advice regarding the immigration consequences of his plea, his appeal fails because he did not satisfy the “prejudice” prong of the *Strickland* test. In other words, Baniassad did not prove it was reasonably probable he would have rejected the plea and “insisted, instead, on proceeding to trial” but for Barnett’s incompetence. (*In re Resendiz* (2001) 25 Cal.4th 230, 253, [abrogated in part on other grounds in *Padilla*, *supra*, 559 U.S. at p. 370].)

In *Lee v. United States* (2017) __ U.S. __ [137 S.Ct. 1958] (*Lee*), the United States Supreme Court set a high evidentiary standard for setting aside a guilty plea based on ineffective assistance of counsel. The court stated: “Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” (*Lee*, *supra*, 137 S.Ct. at p. 1967; see also *Resendiz*, *supra*, 25 Cal.4th at p. 253 [“petitioner’s assertion he would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence’”].)

Here, Baniassad did not support his motion to vacate his conviction with any “contemporaneous evidence” of his mindset to support his contention he would have rejected the plea deal had he known it would result in denial of reentry into the United States if he left the country. Rather, substantial evidence supports the trial court’s finding that in 2002, Baniassad was concerned primarily with maintaining his legal permanent resident status and not being deported. The plea agreement addressed those concerns as much as possible, and Baniassad acknowledges that he retained his lawful permanent resident status and was not deported. His own declaration does not unequivocally state that he would have rejected the plea agreement and instead insisted on proceeding to trial. Rather, he merely stated that he “would have not have accepted the offer on the day in question but instead would have wanted to discuss the issue further with counsel and my family.” Thus, Baniassad did not carry his burden of proving prejudice under the *Strickland* test: He did not prove it was reasonably probable he would have rejected the plea and “insisted, instead, on proceeding to trial” had his attorney properly advised him of the immigration consequences of the guilty plea. (*Resendiz*, *supra*, 25 Cal.4th at p. 253.) Because Baniassad failed to satisfy the prejudice prong of the *Strickland* test, the superior court properly denied Baniassad’s motion to vacate the conviction based on ineffective assistance of counsel.

III

DISPOSITION

The postjudgment order denying the motion to vacate judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.